UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist SALEEL Z. QAASIM
United States Army, Appellant

ARMY 20120312

Headquarters, Fort Bliss
David H. Robertson, Military Judge
Colonel Francis P. King, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Vincent T. Shuler, JA; Captain Ian M. Guy, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Steven J. Collins, JA; Captain Carl L. Moore, JA (on brief).

24 February 2015

SUMMARY DISPOSITION

KRAUSS, Judge:

A panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of unpremeditated murder in violation of Article 118, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 918 (2006).[1] The convening authority approved the adjudged sentence of a dishonorable discharge and confinement for life with eligibility for parole. Appellant was credited with 417 days against the sentence to confinement.

This case is before the court for review under Article 66, UCMJ. Appellant assigns one error alleging instructional errors and also personally raises matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), none of which merit relief.

[1] The government charged appellant with premeditated murder in violation of Article 118, UCMJ.

Facts & Procedural Background

Appellant was involved in a bar fight. After being knocked down in the parking lot outside of the club where the melee began, appellant walked to his car, retrieved a loaded shotgun, confronted one of his antagonists across the street, and pointed the shotgun at him. This man continued to antagonize the appellant, taunting him in derogatory terms and, in essence, daring appellant to shoot him. While doing so, he apparently strained to break free from the grasp of his friend, who had been holding him back, in order to rush appellant. His hands were in full view; he carried no weapon, and never threatened the use of any weapon. There was no evidence that this man either carried a weapon or that appellant thought that he did. The man never broke free of his friend's grasp. Appellant leveled his shotgun at the other man's chest and shot him dead with one slug. Appellant then calmly returned to his car, drove away from the scene with his friends, and as the police pulled him over, told his friends that they need not worry: the shooting was his responsibility.

Witnesses to the shooting testified that the victim was 10-15 feet from the appellant when he was shot. A defense expert opined that the victim was 3-6 feet from the muzzle of the shotgun when he was shot. There was also testimony that the angle of the slug's entry suggested that the victim may have been leaning forward toward the appellant when he was shot.

Appellant's defense was that, though he might be guilty of voluntary manslaughter, he was not guilty of murder. Defense counsel argued, in relation to "heat of passion" and the lesser-included offense of voluntary manslaughter, that appellant was in sufficient fear to negate the murder charges. During defense counsel's closing argument, he lunged toward the panel while arguing the matter of appellant's fear.

The judge instructed the panel on the offenses of premeditated murder, unpremeditated murder, and voluntary manslaughter. Appellant made no objection or request for additional instructions. In the midst of deliberations on findings, the panel asked the military judge for further definition of "unlawful killing." The judge then appropriately supplemented the previous definition provided. Appellant again made no objection or request for additional instructions. In reaction to the panel's query, trial counsel subsequently requested the judge, in a hearing outside of the members' presence, to tell the panel "that no self-defense instruction was given." The judge declined. The panel then recessed for the evening.

The following morning, trial counsel reiterated his concern that the panel members did not fully understand the instructions. The judge reconsidered and decided that, in light of defense counsel argument that might suggest self-defense to the panel, it was appropriate to instruct the panel that the defense did not apply.

Defense counsel objected to any further instruction and affirmatively declared that he never meant to raise or argue the defense of self-defense and that "[w]e know legally there is no self defense." Over this objection, the judge called the members in and instructed them that he had not instructed on self-defense "because under the law that defense is not available under the facts of this case." After further deliberations, the panel then convicted appellant of unpremeditated murder.

Incomplete Instruction

The judge here correctly instructed on premeditated murder and unpremeditated murder, including proper definition of "unlawful killing." In his instruction on unpremeditated murder, he provided a definition of "passion" necessary to resolve whether appellant acted in the "heat of passion" when he killed the victim. When further instructing on the next lesser-included offense of voluntary manslaughter, the judge neglected to repeat the definition of passion, but otherwise provided full and correct instructions. Defense counsel made no objection or request for further instructions.

We find no merit in appellant's contention that the judge committed plain error by failing to repeat the definition for "passion" when instructing on voluntary manslaughter. The judge provided the necessary and appropriate definition earlier in the instructions rendered, counsel made no objection, and considering the instructions as a whole, we are convinced that his failure to repeat the definition did not materially prejudice appellant's substantial rights. *See generally United States v. Park*, 421 U.S. 658, 674-75 (1975); *United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014). The judge did not omit instruction on any element of the relevant charged offense of premeditated murder and its lesser-included offenses and otherwise fully instructed on the offense of voluntary manslaughter. His failure to repeat this definition neither detracted from nor hindered presentation of appellant's defense. In addition, equipped with the proper definition of passion otherwise, there is no good reason to believe the panel was either confused or misled about the matter. We are satisfied beyond a reasonable doubt that even if the judge had repeated the definition of "passion," as appellant now complains, the panel would have returned the same finding. *Payne*, 73 M.J. at 25-26; *United States v. Davis*, 73 M.J. 268, 273 (C.A.A.F. 2014); *United States v. Baxter*, 72 M.J. 507, 513 (Army Ct. Crim. App. 2013).

Instruction that Self-Defense Does Not Apply

We are unaware of a case where a judge, suspecting that a panel might be thinking of an affirmative defense that was not presented, decides to instruct the panel that the defense does not apply under the circumstances. Whether it is better for a judge to leave the matter without further instruction, simply render the

instruction intimated by argument, or do as the judge did here wherein he told the panel he had not instructed on self-defense "because under the law that defense is not available under the facts of this case," we do not here decide. Suffice it to say that appellant suffered no prejudice as a result of this additional instruction.[2]

First, we agree with defense counsel's assessment that, as a matter of law, the evidence did not raise the defense in this case. There is no evidence that appellant reasonably believed that death or grievous bodily injury was about to be inflicted upon him or that he actually believed that the force he used was necessary to prevent that harm, let alone the evidence of his aggressive and provocative act in retrieving and pointing the shotgun. *See generally* Rule for Courts-Martial 916(e)(1), (e)(4); *see also United States v. Behenna*, 71 M.J. 228, 232-33 (C.A.A.F. 2012).

Second, we are as convinced as the defense counsel was in this case that providing an instruction on self-defense would in no way have enhanced appellant's chances at acquittal of murder. Appellant offers no authority, and we find none, for the proposition that he was entitled to any ambiguity he may have enjoyed in light of his argument and the absence of any such self-defense instruction. The fact that the judge accurately advised the panel that self-defense did not apply cannot prejudice the appellant under the circumstances. *See generally United States v. Axelson*, 65 M.J. 501, 510, 517-18 (Army Ct. Crim. App. 2007).

Third, even if the better judgment is that the defense was raised, the judge effectively, then, did nothing other than to inform the panel that appellant affirmatively waived its application. Presuming for the sake of discussion that the panel had considered self-defense until so advised, its verdict is worthy of respect as a matter of law in that this court would and does enforce appellant's waiver of the affirmative defense in any event. *See United States v. Gutierrez*, 64 M.J. 374, 376-78 (C.A.A.F. 2007).

Finally, even if we declined to enforce appellant's affirmative waiver of the defense, we are also convinced beyond a reasonable doubt that its omission from instructions was harmless beyond a reasonable doubt and, therefore, that the judge's instruction that the defense did not apply did not prejudice appellant. *See Payne*, 73 M.J. at 25-26; *Davis*, 73 M.J. at 273; *Baxter*, 72 M.J. at 513.

[2] For the same reasons described supra, we find no merit to appellant's additional contention in his assigned error that the judge, when he advised the panel that self-defense was inapplicable, committed plain error by failing to remind the panel that they should consider "fear" in resolving whether appellant was guilty.

CONCLUSION

After review of the entire record, including the parties' pleadings and the matters personally raised by appellant pursuant to *Grostefon*, the findings of guilty and the sentence are AFFIRMED.

Senior Judge LIND and Judge PENLAND concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court